87-2044

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

JOHN D. THRUSH and ALLEN H. SMITH, ESQ.,
Petitioners

v.

DONNA G. THRUSH,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May a federal court sanction a plaintiff in a civil rights action who sought to avoid the preclusive effect of a state judgment by arguing that he had been denied a "full and fair hearing" when he raised a constitutional objection to a state statute? (The issue raised herein is akin to that before this Court in *Felder v. Casey*, No. 87-526)

2. Does a District Court have authority to order a plaintiff and his attorney in a civil rights action to pay the legal fees of his opponent under Federal Rule of Civil Procedure 11 and its standards, or is fee shifting controlled by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. §1988 and the standards enunciated by this Court in *Christiansburg Garment Co.*, v. *E.E.O.C.*, 434 U.S. 412, 421 (1978)?

3. May a District Court denominate as "patently frivilous" and sanction the contention that a private person taking property of another under an allegedly unconstitutional state statute, is a "state actor" and subject to suit under the Civil Rights Act?

4. Must a litigant identify an argument as an attempt to extend, modify, or reverse existing law, at risk of being sanctioned under Federal Rule of Civil Procedure 11 for failure to do so?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, John D. Thrush and Allen H. Smith, Esq. and respondent before this Court, Donna G. Thrush. The Honorable Clarence C. Morrison was a defendant in the District Court, but did not seek fee shifting and was not a participant to the proceeding in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

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JOHN D. THRUSH and ALLEN H. SMITH, ESQ.,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, John D. Thrush and Allen H. Smith, Esq., respectfully pray that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above-entitles proceeding on March 1, 1988 and in the alternative to summarily reverse under Rule 23.1, the said judgment, at No. 87-5608.

OPINIONS BELOW

The Court of Appeals affirmed the decision of the United States District Court for the Middle District of Pennsylvania dated July 27, 1987 by its Judgment Order of March 1, 1988, which orders are reproduced at A-12 and A-23, respectively.

JURISDICTION

Petitioner Thrush brought suit under 42 U.S.C. §1983 in the Middle District of Pennsylvania on October 20, 1986. On February 17, 1987, the District Court granted defendants' motions to dismiss. Petitioner did not appeal. On April 16, 1987, respondent filed "Defendant's Application for Counsel Fees and Expenses under 42 U.S.C. §1988 and F.R.C.P. 11." The District Court entered judgment against petitioner and his attorney, Allen H. Smith, Esq., petitioner, for respondent's attorney's fees and cost of $5,919.02 on July 30, 1987. Petitioners Thrush and Smith appealed this order which was affirmed on March 1, 1988 by the Third Circuit. Petitioners requested reargument in banc or in panel, which was denied on March 25, 1988. The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1). and under Rule 20.4 of this Court.

STATUTES INVOLVED

The statutes and rules which the case involve are: the *Rules Enabling Act*, 28, U.S.C. §2072; *The Civil Rights Attorney's Fee Award Act*, 42 U.S.C. §1988; and *Federal Rule of Civil Procedure 11*.The text of these statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Respondent Thrush sued petitioner Thrush in divorce, including "equitable distribution," on April 15, 1981. By his decree dated September 8, 1983, County Judge Morrison, previously a defendant before the District Court herein, divested petitioner of various realty and personalty owned by the entireties and owned individually by petitioner and awarded this property to respondent as "equitable distribution" and as part of the divorce decree. Petitioner had objected to the county court that "equitable distribution" constituted an unlawful taking of vested interests and that the standards established for "equitable distribution" were so vague as to be impossible of interpretation. The county court did not even address this issue in its decision.

Petitioner made like objections to the Pennsylvania Superior Court on appeal. The Superior Court filed a brief "Memorandum" dated July 12, 1985 in which it said that the issue of unconstitutional taking "was disposed of by our Supreme Court in *Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982)." A-1 The decision went on to say that the record did not show compliance with Pa. R.C.P. 235(a) requiring notice to the Pennsylvania Attorney General if the constitutionality of a Pennsylvania statute were in issue. A-2 Neither litigant had raised this issue. The Superior Court raised it sua sponte for the first time in its decision. While the record did not reflect it at the time, petitioner's then attorney had given notice of intent to question the constitutionality of "equitable distribution" on November 26, 1984, which had been acknowledged by the Pennsylvania Attorney General. The Attorney General elected not to intervene. Petitioner Thrush sought allowance of appeal to the Pennsylvania Supreme Court and advised that Court that notice of the challenge to the constitutionality of "equitable distribution" of the Pennsylvania Divorce Code had in fact been given to the Pennsylvania Attorney General. On June 4, 1986, the Pennsylvania Supreme Court denied allowance of appeal without opinion.

On October 20, 1986, petitioner filed a complaint under the *Civil Rights Act*, 42 U.S.C. §1983, in the United States District

Court for the Middle District of Pennsylvania, alleging that respondent and Judge Morrison, the county judge who had presided over the divorce action, had utilized the "equitable distribution" provisions of the Pennsylvania Divorce Code, 23 P.S. §401, et seq., to take petitioner's property in violation of Article 5 and 14 of the Amendments to the United States Constitution. Petitioner stated that he had exhausted his means of redress in the Pennsylvania courts and that he feared enforcement of the Pennsylvania judgment to take his property. He requested injunctive and declaratory relief. A-3 to A-6

Judge Morrison and respondent filed Motions to Dismiss that together raised three issues: (1) the Anti-Injunction Act, 28 U.S.C. §2283, prohibited federal injunctions against state court proceedings, (2) one without "official capacity" cannot be sued under the Civil Rights Act and (3) *res judicata*, collateral estoppel and 28 U.S.C. §1257 precluded review of issues dealt with in state court decisions.

On February 17, 1987, the District Court dismissed petitioner's complaint, basing its dismissal on *res judicata*, collateral estoppel and 28 U.S.C. §1257. No mention was made of respondents' other arguments. A-7 to A-11. Petitioner did not appeal.

On April 27, 1987, respondent Thrush filed an "Application for Counsel Fees and Expenses Under 42 U.S.C. §1988 and F.R.C.P. 11." Petitioner opposed this application. On July 27, 1987, the District Court entered an "Opinion and Order" directing respondent and his attorney, Allen H. Smith, Esq., "jointly and severally" to pay respondent's attorney's fees and costs in the amount of $5,919.02. A-12 to A-22.

In its ruling, the District Court ruled as "frivolous" and subject to sanction under Rule 11, three matters. The first was petitioner's argument that he was not collaterally estopped from raising his constitutional objections to "equitable distribution" by the decision of the Pennsylvania Superior Court. Petitioner had argued that the Superior Court had not afforded him a "full and fair hearing" under *Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980).

In sanctioning petitioner, the District Court said:

> ". . . The gist of his (petitioner's) argument is that after exhausting all available state court remedies, litigants may raise identical claims in a federal district court if they have been denied a full and fair opportunity to litigate their claims in the state courts. This theory would not only negate in substantial measure the rule that only the United States Supreme Court may review a decision of the highest court of a state under 28 U.S.C. §1257 but would also greatly expand the jurisdiction of the lower federal courts. At a time when the federal courts are more burdened than ever before and when serious discussion has focused on *limiting* the jurisdiction of the federal courts by abolishing or modifying the requirements for diversity jurisdiction, we are not persuaded that this argument to expand jurisdiction has been made in good faith . . . ." A-19.

Good faith or bad faith was not the question. Petitioner's "theory" was derived from *Allen v. McCurry*, supra, in which this Court said:

> ". . . But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case . . . ." 449 U.S. 95, 66 L.Ed.2d 313, 101 S.Ct. 415.

If petitioner's argument is frivolous, where does that put the opinion of the United States Supreme Court?

Of particular concern was the holding of the Pennsylvania Superior Court not to even consider petitioner's constitutional defense because the court thought that petitioner had not notified the Attorney General of Pennsylvania of petitioner's challenge to the constitutionality of the "equitable distribution" provisions of the Pennsylvania Divorce Code. The need for notice to assert a civil right is sister to the issue in *Felder v. Casey*, No. 87-526, now before this Court.

The District Court branded as "patently frivolous" petitioner's proposition that a private person using an unconstitutional

state statute, enforced by state officials, could be a "state actor" "acting under color of state law." A-18. Such conclusion is contrary to *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982). *Lugar* was cited with several similar cases to the District Court and to the Court of Appeals.

Finally, the District Court stated that "Failure to present a claim as an attempt to expand existing law prior to the filing of a Rule 11 motion supports the imposition of sanctions." A-20.

Appellant and his attorney, Allen H. Smith, appealed the determination of the District Court. The matter was briefed and assigned to a panel of Judges of the Court of Appeals for the Third Circuit on *February 29, 1988*, who on *March 1, 1988* affirmed the order of the District Court. A-23. Petitioner requested rehearing before the panel or before the court in banc which was denied by order of March 25, 1988.

REASONS FOR GRANTING THE WRIT

I

THE LOWER COURTS HAVE ALLOWED PRECLUSIVE EFFECT TO A STATE JUDGMENT WHERE PETITIONER WAS DENIED A "FULL AND FAIR HEARING" OF HIS CONSTITUTIONAL OBJECTIONS IN THE STATE COURT AND WAS SANCTIONED FOR EVEN QUESTIONING THE PRECLUSIVE EFFECT

This Court held in *Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980):

> "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176, 5 L.Ed.2d 492, 81 S.Ct. 473. This understanding of §1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim . . ." 449 U.S. 101, 66 L.Ed.2d 317, 101 S.Ct. 418.

In the case at bar, the Pennsylvania Superior Court noted that petitioner here had argued that "equitable distribution" under the Pennsylvania Divorce Code was "unconstitutionally vague." It observed that the Pennsylvania Courts had not ruled on this point and then said:

> "Appellant (petitioner Thrush) here did not give the required notice to the Attorney General, see Pa. R.Civ.P. 235(a), either in the trial court or in this court. Where this procedure is not followed, the issue must be deemed abandoned or waived." A-2.

Petitioner's other argument in the Superior Court has been that in the key Pennsylvania case dealing with equitable distribution, *Bacchetta v. Bacchetta*, cited below, the Pennsylvania Supreme Court had misinterpreted two key United States Supreme Court cases. The Superior Court brushed aside this proposition with the statement:

> ". . . Appellant's first argument was disposed of by our Supreme Court in *Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982) . . ."

Petitioner Thrush sought leave to have his case reviewed by the Pennsylvania Supreme Court and in his application, he called to the attention of the court the fact that *notice has actually been given to the Pennsylvania Attorney General* as required by Pennsylvania rules of court. Nevertheless, the Pennsylvania Supreme Court declined to review the Superior Court decision.

Petitioner sought relief in the United States District Court in a civil rights action and on motion by defendants, the District Court dismissed the action. Although the District Court seemed to recognize the rule that petitioner was entitled to a "full and fair hearing" on his claim in state court that there was an unconstitutional taking, the court noted that this petitioner did not request reargument in either the Pennsylvania Superior or Supreme Courts. The district court cited no authority for there being a need for such request under *Allen v. McCurry*, supra. A-11. The district court concluded:

> "The Pennsylvania courts have spoken on the issue. We are of the view that Mr. Thrush is collaterally estopped from bringing this action and that we have no jurisdiction to hear this case." A-11.

In its subsequent ruling on sanctions on July 27, 1987, the District Court said:

> "6. Attorney Smith's argument that John D. Thrush did not have a fair and full opportunity to litigate the constitutionality of the equitable distribution section of the Pennsylvania Divorce Code in the Pennsylvania courts and that this Court had jurisdiction to act was frivolous." A-22.

The Court of Appeals affirmed the decision of the District Court without opinion. A-23.

The conclusions of the two lower federal courts run contrary to this Court's ruling in *Allen v. McCurry*, supra. The state courts had simply refused to consider petitioner's argument that *Bacchetta* was defective under federal constitutional law. Worse, the Superior Court summarily dismissed the argument that "equitable distribution" was unconstitutionally vague for presumed, though mistaken belief, that petitioner had not complied with a Pennsylvania rule of court.

It would have been improper for the Pennsylvania courts *to refuse to hear* petitioner's constitutional arguments because of presumed lack of service on the Pennsylvania Attorney General. The Attorney General may have an interest in becoming involved in litigation that challenges Pennsylvania statutes, but the Pennsylvania courts could easily have protected that interest without trampling on the civil rights of the individual. In this case, notice had actually been given, and even if it had not, the court could have delayed its decision until notice had been given. The Pennsylvania Supreme Court was put on notice that the Attorney General knew of the constitutional challenge when petitioner sought review of the Superior Court ruling. It did not remand the case or hear the case. The Pennsylvania courts seemed content to ignore petitioner's constitutional challenges.

This Court has before it, *Felder v. Casey*, No. 87-526. The case is on certiorari from the Supreme Court of Wisconsin, 139 Wis.2d 614, 408 N.W.2d 19 (1987). It was a civil rights action in the state court which was dismissed for failure of the plaintiff to file a "notice of claim" with the municipality within 120 days of the cause of action. That case is a sister case to the present matter. Disposition of the petition in this case might appropriately await the decision in *Felder*, at which time remand to the Third Circuit might also be appropriate.

Even if this Court sustains the "notice of claim" provision in *Felder* as a proper procedure, this Court should consider the present case. Here, petitioner was a defendant and did not choose the forum in which the case was tried. He cannot be regarded as having consented to state rules that placed restrictions on how he might assert his constitutional defenses.

II

RULE 11 IS BEING USED AS A FEE SHIFTING MECHANISM, CONTRARY TO *THE RULES ENABLING ACT* AND IN PLACE OF *THE CIVIL RIGHTS ATTORNEY'S FEE AWARD ACT*.

Fee shifting in civil rights cases is in a state of complete confusion in all of the federal courts. Fees are being shifted under the following provisions: *The Civil Rights Attorney's Fee Award Act*, 42 U.S.C. §1988, *Federal Rule of Civil Procedure 11*, *Federal Rule of Appellate Procedure* 38, 28 U.S.C. §1912 and 28 U.S.C. §1927.

The scope, standards and application of these rules vary from one rule or statute. Rule 11, the sole mechanism in this case, is the broadest and strictest of the fee shifting/sanction rules. Under it, sanctions are *mandatory* but are applied under standards as changeable as the court. *Rule 11 is Only the Beginning*, ABA Journal, May 1, 1988, page 62; *The Trouble with Rule 11, Uncertain Standards and Mandatory Sanctions*, ABA Journal, August 1, 1987, page 87; *Sanctions Under Amended Federal Rule 11-Some "Chilling Problems" in the Struggle between Compensation and Punishment*, Georgetown Law Journal, Vol. 74, p. 1313 (1986); *The Demise of a Subjective*

Bad Faith Standard Under Amended Rule 11, Temple Law Quarterly, Vol. 59, p. 107 (1986).

One point that has generally eluded notice is the limitation placed on rule-making by the *Rules Enabling Act*., 28 U.S.C. §2072. In pertinent part that statute provides:

> §2072. *Rules of Civil Procedure*. The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleading, and motions, in the district courts and courts of appeals of the United States in civil actions . . . *Such rules shall not abridge, enlarge or modify any substantive right* . . ." (Emphasis added.)

From the words of the statute, it would appear that Rule 11 should *not* be treated as a general fee shifting device and that where there is a fee shifting statute such as the *Civil Rights Attorney's Fee Award Act*, 42 U.S.C. §1988, it would be improper to apply Rule 11 to direct the losing party to pay the prevailing party's attorney fee. See *Gaiardo v. Ethyl Corp*., 835 F.2d 479, 483 (3rd Cir. 1987).

This Court has established standards to be used in civil rights cases in shifting fees. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L.Ed.2 1263, 88 S.Ct. 964 (1968) and *Christiansburg Garment Co. v. E.E.O.C*., 434 U.S. 412, 422, 54 L.Ed.2 648, 98 S.Ct. 694 (1978). Those standards were not applied in this case which was brought under 42 U.S.C. §1983. Rule 11 is different from 42 U.S.C. §1988 in that it is a "mandatory" sanction, it allows imposition of sanctions on both the litigant *and* his attorney, and the nature of the sanctions may be other than fee shifting. The bar and lower courts need guidance as to whether Rule 11 or the *Civil Rights Attorney's Fee Award Act*. 42 U.S.C. §1988 is applicable in civil rights cases. The bar and lower courts are equally in need of general guidance in understanding when sanctions may be applied and under what standards.

III

THE LOWER COURTS HAVE RULED COMPLETELY CONTRARY TO THIS COURT'S DECISION IN *LUGAR* v. *EDMUNDSON OIL CO.* AND HAVE IMPOSED SANCTIONS FOR ARGUING ITS APPLICABILITY

When petitioner brought this civil rights action it was premised on this Court's holding in *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982) where a private person/creditor used a state attachment statute to seize property in violation of the Fourteen Amendment. In *Lugar*, this Court cited *Adickes* v. S.H. Kress & Co., 398 U.S. 144, 152, 26 L.Ed.2 142, 90 S.Ct. 1598, 1605, as follows:

> " 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. *To act "under color" of law does not require that the accused be an officer of the State.* It is enough that he is a willful participant in joint activity with the State or its agents.' " quoting *United States v. Price*, 383 U.S., at 794, 16 L.Ed.2d 267, 86 S.Ct. 1152." (Emphasis added)

Petitioner reasoned that when a private person/spouse used "equitable distribution" provisions of a divorce code to take property of the other spouse in violation of the Fifth and Fourteen Amendments, the taking spouse would be a "state actor" acting under color of law and liable under 42 U.S.C. §1983. *Lugar* was cited to both the District Court and the Court of Appeals. Neither court in any way distinguished *Lugar* or for that matter even mentioned the case.

In imposing sanctions the District Court dwelt on the fact that respondent held no official capacity and was not a government official. A-14, A-19 It was apparent that the court felt that one had to hold some government position to be sued under 42 U.S.C. §1983. The Court of Appeals accepted the District Court opinion and made no correction of the this confusion regarding "state actors." A-23

Petitioner understands that the Supreme Court does not exist to merely correct errors of the lower courts. However, this is a significant error and petitioner is being sanctioned for having the correct view of the law, based on decisions of this Court. There is surely an obligation on the part of this Court to protect a litigant and an attorney who are being punished under a rule of this Court for following decisions laid down by this Court.

IV

THE LOWER COURTS WOULD IMPOSE A RULE OF "ARGUMENT IDENTIFICATION" ON FEDERAL PLEADING AND BRIEFING.

In the district court decision imposing sanctions the court said

> "Only *after* the filing of the Rule 11 motion did he (petitioner) advance the argument that he was attempting to extend, modify, or reverse existing law. Failure to present a claim as an attempt to expand existing law prior to the filing of a Rule 11 motion supports the imposition of sanctions . . . ." (Emphasis added) A-20

This is not a good rule. The Ninth Circuit has dealt with a District Court's finding of sanctions under reasoning like that shown above. The concept was referred to as "argument identification." The case in point is *Golden Eagle Distributing Corp. v. Burroughs*, 801 F.2d 1531 (9th Cir. 1986). In the cited case, the Court of Appeals observed as follows:

> (1) Nothing in Rule 11 or its commentary required one to identify arguments as efforts at extension, modification or reversal of existing law.
>
> (2) The court observed: "It is not always easy to decide whether an argument is based on established law or is an argument for the extension of existing law."
>
> (3) "Argument identification" creates a conflict between "... the lawyer's duty zealously to represent his

client, Model Code of Professional Responsibility, Canon 7, and the lawyer's own interest in avoiding rebuke."

(4) Rule 11 was not intended to punish frivolous argument or parts of argument.

All of these seem sound arguments for rejection of a rule of "argument identification." The Ninth Circuit denied the concept. If the Third Circuit has embraced the idea, this petition for certiorari should be granted to allow this Court to advise the lower courts on the wisdom or lack of wisdom of such a rule.

CONCLUSION

The Court may deem it appropriate to remand this case to the Third Circuit after it has decided *Felder v. Casey*, No. 87-526. Equally appropriate would be summary disposition on the merits under Rule 23.1 as to Questions 1 and 3. The conclusions of the lower courts are so contrary to this Court's rulings in *Allen v. McCurry*, supra, and *Lugar v. Edmundson Oil Co.*, supra, as to justify summary reversal.

Question 2 raises important issues regarding the conflict between Rule 11 and the Civil Rights Attorney's Fee Act. What device should be used for fee shifting in civil rights cases is an important and troublesome issue. Similarly, Question 4 raises the need for "argument identification" to avoid sanctions under Rule 11. Rule 11 can impact for good and bad. Intended to ease litigation demands in federal courts, it has spawned hundreds if not thousands of controversy over who is going to pay the bill for litigation. Although Rule 11 is of this Court, there has yet been no guidance from this Court as to its application. This petition should be granted to allow the Court to address Rule 11.

Respectfully submitted,

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APPENDIX

APPENDIX

DONNA G. THRUSH, Appellee	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	)	
JOHN D. THRUSH, Appellant	)	No. 00382 Harrisburg 1983

Appeal from the Decree of the Court of Common Pleas, Civil Division, of Dauphin County, No. 1314-S, 1981.

Before: TAMILIA, MONTGOMERY and ROBERTS, JJ.

MEMORANDUM FILED: JULY 12, 1985

This is an appeal from a final decree in divorce which order also provided for the equitable distribution of the parties' marital property and awarded alimony to appellee, Donna G. Thrush. Finding no merit to appellant's arguments, we affirm.

Appellant first argues that the equitable distribution sections of the Divorce Code, 23 P.S. §401, are unconstitutional for two reasons: (1) that the statute is an unconstitutional taking of property without due process, and (2) that the standards for distribution of property are unconstitutionally vague. Appellant's first argument was disposed of by our Supreme Court in *Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982), which found the statute to pass constitutional muster in that respect. Appellant's citation to *Krenzelak v. Krenzelak*, 503 Pa. 373, 469 A.2d 987 (1983), is inapposite. That case involved a transfer of solely-owned property prior to the enactment of the 1980 Divorce Code. The Supreme Court held that voiding the transfer pursuant to §401 would deprive the *transferee* of vested property rights. No third party's rights are involved in any of the property herein distributed so *Krenzelak* is inapplicable.

Appellant argues that the vagueness issue was not specifically decided in *Bacchetta*. That decision did discuss the various factors to be used in determining the equitable distribution;

however, the vagueness argument does not appear to have been before the Supreme Court in that case. However, it is not properly before this court either. Appellant did not give the required notice to the Attorney General, *see*, Pa.R.Civ.P. 235(a), either in the trial court or in this court. Where this procedure is not followed, the issue must be deemed abandoned or waived. *Gravinese v. Johns-Manville Corp.*, Pa.Super. , 471 A.2d 1233 (1984); *Spidle v. Livingston Const. Co., Inc.*, 311 Pa.Super. 201, 457 A.2d 565 (1983).

The remainder of appellant's arguments relate to the award and amount of alimony, the specific distribution of property and the award of counsel fees. As to alimony, appellant argues that the hearing court failed to consider the appellee's employability or misconduct and appellant's needs, earnings and obligations. He argues the court erred in considering "valueless" property, property acquired after separation, and costs of sale of the marital home in determining equitable distribution. Finally, he argues the award of counsel fees and costs was improper because the court failed to state sufficient reasons therefor.

Appellate review of these issues is limited to determining whether the trial court abused its discretion. *Gee v. Gee*, 314 Pa.Super. 31, 460 A.2d 358 (1983); *Remick v. Remick*, 310 Pa.Super. 23, 456 A.2d 163 (1983). A finding of abuse is not made lightly but only on a showing of clear and convincing evidence that the law is overridden or misapplied or the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will. *Butler v. Butler*, Pa.Super. , 488 A.2d 1141 (1985); *Wolk v. Wolk*, 318 Pa.Super. 311, 464 A.2d 1359 (1983). After thoroughly reviewing the complete record in this case, we are unable to conclude that the court below abused its discretion in any of the matters complained of. The opinion of the Honorable Clarence C. Morrison adequately discusses and disposes of appellant's contentions.

Decree affirmed.

IN THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN D. THRUSH,	:	CIVIL ACTION NO. 86-1466
Plaintiff	:	
v.	:	Filed October 20, 1986
CLARENCE C. MORRISON,	:	
Defendant	:	
and	:	
DONNA G. THRUSH,	:	
Defendant	:	

COMPLAINT

I. NATURE OF THE ACTION

1. This is a civil rights action brought under 42 U.S.C. Section 1983 and the United States Constitution by Plaintiff asserting his rights against Defendants who seek to take property vested in him alone or with others, under color of provisions of the Pennsylvania Divorce Code, Act of April 2, 1980, P.L. 63, No. 26, 23 P.S. §101, et seq., and specifically section 401(b), (c), (d), (e), (f), (g), and (j), attached hereto. Plaintiff seeks declaratory and injunctive relief. The basis of the action is that certain provisions of the Divorce Code violate rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

II. JURISDICTION

2. This Court has jurisdiction of this action by virtue of 28 U.S.C. Section 1343(3) and 1343(4) authorizing jurisdiction of claims brought under 42 U.S.C. Section 1983 to enforce rights guaranteed by the United States Constitution, and by virtue of 28 U.S.C. Section 1331. This action also seeks declaratory judgment pursuant to 28 U.S.C. Section 2201 and 2202.

III. PARTIES

3. Plaintiff, John D. Thrush, is a citizen of the United States, and resides at 302 Boas Street, Harrisburg, Dauphin County, Pennsylvania.

4. Defendant, the Honorable Clarence C. Morrison, was at all times relevant herein, a judge of the Court of Common Pleas of Dauphin County, Pennsylvania, working and having his seat of office at the Dauphin County Courthouse, Front and Market Streets, Harrisburg, Dauphin County, Pennsylvania.

5. The Defendant, Donna G. Thrush, resides at 511 Lamp Post Lane, Camp Hill, Cumberland County, Pennsylvania.

6. Defendants are sued individually and in their official capacities. Relief is sought against them as well as their agents, assistants, employees, and persons acting in concert or cooperation with them or at their direction or under their supervision.

7. At all times relevant herein Defendants have acted under the color of authority of the law of the Commonwealth of Pennsylvania or in active concert with such Defendant who was so acting.

IV. ACTION

8. On April 15, 1981, Defendant, Donna G. Thrush, filed a complaint in divorce in the Court of Common Pleas of Dauphin County, Pennsylvania, wherein she sought, among other things, "equitable distribution" of property belonging solely to the Plaintiff or belonging to Plaintiff and Defendant, Donna G. Thrush, as tenants of an estate by the entireties.

9. The issues of the case were heard before a special master whose report was submitted to Defendant, the Honorable Clarence C. Morrison, and who by his Order and Decree dated September 8, 1983, divested Plaintiff of all interest in a property known as 511 Lamp Post Lane, Camp Hill, Cumberland County, Pennsylvania, then owned by Plaintiff and Defendant, Donna G. Thrush, as tenants of an estate by the entireties, and similarly divested Plaintiff of any interest in a Volkswagon automobile, furnishings, and personal property at the premises referred to above, and also owned as tenants by the entireties.

Defendant, the Honorable Clarence C. Morrison, further directed the Plaintiff to pay Defendant, Donna G. Thrush, $5,000.00 as further "equitable distribution." The said Order and Decree further provided that a certain mortgage and other obligations, previously the joint obligation of Plaintiff and Defendant, Donna G. Thrush, become the sole obligation of one or the other.

10. Plaintiff appealed the Order and Decree to the Superior Court of Pennsylvania alleging an unconstitutional taking of property under the Constitution of the United States and under the Constitution of Pennsylvania, which appeal was denied by the Superior Court of Pennsylvania in its Decision of July 12, 1985.

11. Plaintiff petitioned the Supreme Court of Pennsylvania for allowance of appeal from the final order of the Superior Court of Pennsylvania and by letter of June 4, 1986, Plaintiff was advised that his petition for allowance of appeal was denied.

12. Plaintiff has exhausted his means of redress in the Pennsylvania Courts.

13. Plaintiff has no doubt that Defendants will seek to enforce said Order and Decree of Defendant, the Honorable Clarence C. Morrison, which will divest Plaintiff of vested property rights and which would impair the obligation of contract rights between the Plaintiff, John D. Thrush, and Defendant, Donna G. Thrush, and certain third parties. Plaintiff has no remedy at law to prevent this taking of vested property rights of impairment of contract, which taking would be a deprivation of property in violation of rights guaranteed under the Amendments to the Constitution of the United States and which impairment of contract is beyond the power of the states under the Constitution of the United States.

Plaintiff will continue to suffer irreparable injury unless Defendants are enjoined from enforcement of the complained Order and Decree.

PRAYER FOR RELIEF:

WHEREFORE, Plaintiff respectfully requests:

A. That the Court issue a permanent injunction restraining Defendants and the employees, agents, and servants from enforcing the Order and Decree herein described and from making any equitable distribution under said Order and Decree; and

B. Declare that Section 401 of the Pennsylvania Divorce Code, supra, violates the Constitution and the Amendments to the Constitution of the United States, as described above; and

C. Award Plaintiff his costs and attorney's fees, pursuant to 42 U.S.C. Section 1988; and

D. Enter such other and further relief as the Court deems just and proper.

Respectfully submitted,

Allen H. Smith, Atty.
for Plaintiff
47 North Duke Street
York, PA 17401
(717) 854-6609

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN D. THRUSH,	:	
Plaintiff	:	Civil No. 86-1466
vs.	:	(Judge Muir)
CLARENCE C. MORRISON, et al.,	:	Complaint Filed 10/20/86
Defendants	:	

ORDER

February 17, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 20, 1986, John D. Thrush filed this action pursunt to 42 U.S.C. §1983 seeking to enjoin the Defendants from enforcing an order against him pursuant to the Pennsylvania Divorce Code and a declaration that the equitable distribution section of the Pennsylvania Divorce Code is violative of the United States Constitution. The Defendants are Donna G. Thrush, the former spouse, and The Honorable Clarence C. Morrison, a Judge of the Court of Common Pleas of Dauphin County, Pennsylvania.

On November 17, 1986, Defendant Thrush filed a motion to dismiss and on November 26, 1986, she filed a brief in support of her motion. On November 28, 1986, Morrison filed a motion to dismiss and on December 4, 1986, he filed a brief in support. On December 17, 1986, Mr. Thrush filed a responsive brief and on February 2, 1987, Ms. Thrush filed a reply brief. The motion is now ripe for our disposition.

In considering a motion to dismiss, the complaint must be liberally construed and viewed in the light most favorable to the Plaintiff. Gomez vs. Toledo, 446 U.S. 635, 636 n. 3 (1980); Jennings vs. Shuman, 567 F.2d 1213, 1216 (3d Cir. 1977). The factual allegations contained in the complaint and every deducible inference therefrom must be accepted as true for the purposes of the motion. United States vs. Mississippi, 380 U.S.

128 (1965). We should not dismiss Mr. Thrush's complaint at the pleading stage unless it appears beyond doubt that he can prove no set of facts in support of his claim which would entitle him to relief. Conley vs. Gibson, 335 U.S. 41, 41-46 (1957); Robb vs. Philadelphia, 733 F.2d 283 (3d Cir. 1984).

Viewing the allegations of the complaint as true and construing them in the light most favorable to Mr. Thrush, the following facts must be accepted. Ms. Thrush filed an action for divorce against Mr. Thrush in the Court of Common Pleas of Dauphin County on April 15, 1981. Judge Morrison granted a divorce and ordered the marital property equitably distributed.

Mr. Thrush appealed the order to the Superior Court of Pennsylvania alleging vagueness and an unconstitutional taking of property under the United States Constitution and the Pennsylvania Constitution. On July 12, 1985, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas. The Superior Court relying on Bachetta vs. Bachetta, 498 Pa. 227 (1982), held that Pennsylvania's equitable distribution statute was constitutional. The vagueness argument was deemed abandoned by the Superior Court for failure to comply with Pa.R.Civ.P. 235(a) which requires litigants to notify the Attorney General whenever they intend to raise the constitutionality of a Pennsylvania statute. Mr. Thrush then petitioned the Supreme Court of Pennsylvania for allowance of appeal. On May 29, 1986, the Pennsylvania Supreme Court entered an order denying Mr. Thrush's petition.

Defendants make several arguments in support of their motion. We shall address only the arguments concerning subject matter jurisdiction and collateral estoppel because our resolution of these arguments obviates the need to reach the others.

The Defendants contend that we do not have subject matter jurisdiction to review a decision of the Pennsylvania Supreme Court declaring a Pennsylvania statutue constitutional under 28 U.S.C. §1257 which provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

> (2) by appeal, where if drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

The United States Supreme Court has interpreted this statute as granting exclusive jurisdiction to review state decisions to itself. The Supreme Court clearly stated in Atlantic Coastline Ry. Co. vs. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970), that ". . . lower federal courts possess no power whatever to sit in direct review of state court decisions."

Defendants argue that Mr. Thrush's complaint seeks reconsideration of the issues previously presented to the Pennsylvania appellate courts which were decided adverse to him. Thus, Defendants argue that the suit in this court is merely an attempt to circumvent 28 U.S.C. §1257 by trying to sue in this Court rather than by appealing to the United States Supreme Court.

Mr. Thrush agrees that when the highest court of a state decides a case adverse to a litigant, his or her only forum for further review is the United States Supreme Court. However, he argues that an exception exists in this case because he has been denied a full and fair opportunity to litigate the issues in the state court. This argument does not go to whether we have subject matter jurisdiction to decide this case but to whether Mr. Thrush is collaterally estopped from relitigating the issue of the constitutionality of the equitable distribution section of the Pennsylvania Divorce Code in this Court. We agree with Defendants that pursuant to 28 U.S.C. §1257 we lack subject matter jurisdiction to review a decision of the Pennsylvania Supreme Court in Mr. Thrush's case. We will, however, address Mr. Thrush's sole argument in opposition to the motion to dismiss.

Mr. Thrush contends that he may litigate this case in this court because he was denied a full and fair opportunity to litigate his claim that the equitable distribution section of the Pennsylvania Divorce Code is unconstitutionally vague. Under the doctrine of collateral estoppel a court's decision on an issue of

fact or of law which is necessary to its judgment is conclusive with respect to that issue in a subsequent suit based upon a different cause of action involving a party to the first case. Montana vs. United States, 440 U.S. 147, 153 (1979). The purpose of this doctrine is to prevent the waste of judicial and individual resources, minimize the occurrence of inconsistent decisions and encourage reliance upon judicial decisions. Allen vs. McCurry, 449 U.S. 90-94 (1980).

The federal courts have consistently applied collateral estoppel to issues decided by the state courts. *E.g.* Migra vs. Warren City Schools Dist. Bd. of Educ., 465 U.S. 75 (1984) and it is applicable to §1983 claims. *See* Allen vs. McCurry, 449 U.S. 90 (1980).

The doctrine of collateral estoppel applies when (1) the issue decided in the prior litigation is identical to the issue in the present litigation, (2) the prior litigation resulted in a final judgment on the merits, (3) the party against whom the estoppel is asserted is a party or in privity with the party to the prior proceeding and (4) the opportunity to present the claim in the prior proceeding was full and fair. Scooper Dooper, Inc. vs. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974).

Mr. Thrush agrees that the question of whether the equitable distribution section of the Pennsylvania Divorce Code is constitutional is identical to the issue decided in the state court proceeding, that the state court litigation resulted in a final decision on the merits and that he was a party to the prior litigation. Mr. Thrush's sole contention is that he was denied a full and fair opportunity to litigate the vagueness issue because the Superior Court refused to consider the issue on the ground that Mr. Thrush failed to notify the Attorney General of Pennsylvania of his intention to raise a constitutional question. Mr. Thrush states that he did in fact notify the Attorney General but simply failed to show in the record that such notice had been given.

Mr. Thrush was given a full and fair hearing in the Court of Common Pleas. With this he has no dispute. Mr. Thrush made a timely appeal to the Superior Court of Pennsylvania. The Superior Court issued an opinion in his case but deemed the

vagueness issue abandoned or waived on the basis of a procedural technicality. Thereafter, Mr. Thrush could have requested the Pennsylvania Court to reconsider his argument under Pennsylvania Rules of Appellate Procedures 2541 and 2542. He could have shown that he did in fact notify the Attorney General. This was not done. Mr. Thrush filed a petition for allowance of appeal to the Pennsylvania Supreme Court following the adverse decision in the Superior Court which was subsequently denied. Under Pa.R.App.P. 1123 Mr. Thrush could have made an application for reconsideration of the denial of the petition for allowance to the Pennsylvania Supreme Court. This was not done. Under 28 U.S.C. §2101(c) and 2104, the Pennsylvania Supreme Court order denying the appeal could have been appealed to the United States Supreme Court within 90 days after entry of the order. This was not done. Mr. Thrush has failed to avail himself of all the opportunities for review of decisions adverse to his claim and now attempts to relitigate his claim in this court on the ground that he was denied a full and fair opportunity to litigate his vagueness claim. Mr. Thrush seeks the same relief that he has sought all along: a declaration that the equitable distribution section of the Pennsylvania Divorce Code is unconstitutional. The Pennsylvania courts have spoken on the issue. We are of the view that Mr. Thrush is collaterally estopped from bringing this action and that we have no jurisdiction to hear this case. We will grant Defendants' motion to dismiss.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Defendants' motion to dismiss is hereby granted.
2. The Clerk of Court shall close this case.

Muir, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN D. THRUSH,	:	
Plaintiff	:	Civil No. 86-1466
	:	Complaint Filed 10/20/86
vs.	:	(Judge Muir)
	:	
CLARENCE C. MORRISON, and DONNA G. THRUSH,	:	
Defendants	:	

OPINION

MUIR, District Judge.

I. Introduction.

On October 20, 1986, John D. Thrush filed this action pursuant to 42 U.S.C. §1983 seeking to enjoin the Defendants from enforcing an order against him pursuant to the Pennsylvania Divorce Code and a declaration that the equitable distribution section of the Pennsylvania Divorce Code is violative of the United States Constitution. By order of February 17, 1987, this Court dismissed the case on the ground that it lacked subject matter jurisdiction to review a decision of the Pennsylvania Supreme Court. On April 16, 1987, Donna G. Thrush filed an application for counsel fees and expenses pursuant to 42 U.S.C. §1988 and Fed.R.Civ.P. 11.

On June 2, 1987, a hearing was held on Donna G. Thrush's application for counsel fees and expenses. The following are the Court's findings of fact, discussion, and conclusions of law.

II. Findings of Fact.

1. On April 15, 1981, Donna G. Thrush filed a divorce action against John D. Thrush in the Court of Common Pleas, Dauphin County, Pennsylvania.

2. The Honorable Clarence C. Morrison entered an order, date unascertainable from the record, dissolving the marriage of

John D. and Donna G. Thrush and ordered the marital property equitably distributed pursuant to the Pennsylvania Divorce Code.

3. John D. Thrush appealed Judge Morrison's order to the Superior Court of Pennsylvania, alleging, inter alia, an unconstitutional taking of property under the United States Constitution.

4. On July 12, 1985, the Superior Court, relying on Bachetta vs. Bachetta, 498 Pa. 227 (1982), held that Pennsylvania's equitable distribution statute is constitutional.

5. John D. Thrush did not file a motion for reconsideration in the Superior Court of Pennsylvania.

6. On August 13, 1985, John D. Thrush petitioned the Supreme Court of Pennsylvania for allowance of appeal from the order of the Superior Court.

7. On May 29, 1986, the Supreme Court of Pennsylvania denied John D. Thrush's petition.

8. John D. Thrush did not appeal the decision of the Supreme Court of Pennsylvania to the United States Supreme Court.

9. On October 20, 1986, John D. Thrush filed a complaint in the United States District Court for the Middle District of Pennsylvania pursuant to 42 U.S.C. §1983 raising the identical issues he had raised in the Pennsylvania courts.

10. On February 17, 1987, this Court dismissed the complaint.

11. The complaint bears the signature of attorney Allen H. Smith.

12. Attorney Smith knew at the time he filed the complaint, or should have known after conducting a reasonable inquiry, that Donna G. Thrush was not a government official.

13. Attorney Smith knew when he filed the complaint, or should have known after conducting a reasonable inquiry, that Donna G. Thrush had not acted and did not intend to act in concert with a state actor in any way which would have rendered her liable under 42 U.S.C. §1983.

14. Attorney Smith knew or should have known after reasonable inquiry prior to filing the complaint that "state action" is a prerequisite for liability under 42 U.S.C. §1983.

15. Attorney Smith knew or should have known after reasonable inquiry prior to filing the complaint that only the United States Supreme Court has jurisdiction to review a decision of the highest court of a state.

16. The complaint contained a claim for attorney's fees.

17. Attorney Smith has not sent his client, John D. Thrush, a bill for services rendered.

18. Attorney Smith did not execute a fee agreement with his client, John D. Thrush.

19. Attorney Smith did not maintain contemporaneous records of time spent on this case.

20. The facts alleged in the complaint were sworn to by John D. Thrush.

21. John D. Thrush swore that the Defendants were sued ". . .individually and in their official capacities. . . ."

22. John D. Thrush knew at the time he signed the affidavit attached to the complaint that his ex-wife, Donna G. Thrush, had no "official capacity."

23. John D. Thrush swore that ". . .Defendants have acted under color of authority of the law of the Commonwealth of Pennsylvania or in active concert with such defendant who was so acting."

24. At the time John D. Thrush signed the affidavit he knew his ex-wife, Donna G. Thrush, had never been in a position such that she could act under color of state law.

25. At the time John D. Thrush signed the affidavit he knew his ex-wife had only filed an action for divorce and had defended appeals in the state courts.

26. John D. Thrush is an Administrative Law Judge with the Social Security Administration.

27. John D. Thrush earns approximately $60,000-$62,000 annually.

28. John D. Thrush assisted in preparing the complaint in this case.

29. John D. Thrush directed Attorney Smith to a forms book containing sample complaints for actions filed pursuant to 42 U.S.C. §1983.

30. On November 17, 1986, Donna G. Thrush filed a motion to dismiss the complaint.

31. In the motion to dismiss Donna G. Thrush raised the issues of subject matter jurisdiction, failure to state a claim pursuant to 42 U.S.C. §1983, the full faith and credit clause, and collateral estoppel.

32. John D. Thrush's sole argument in opposition to the motion to dismiss was that he had been denied a "full and fair opportunity" to litigate the constitutionality of the Pennsylvania Divorce Code in the state courts.

33. Donna G. Thrush retained attorney Dianne Dusman to represent her in this case.

34. Donna G. Thrush earns $14,800 annually.

35. Attorney Dusman agreed to seek payment of counsel fees and expenses under the Civil Rights Act, 42 U.S.C. §1988 and Fed.R.Civ.P. 11.

36. In Attorney Dusman's representation of Donna G. Thrush she filed a Motion to Dismiss the Complaint, a Brief in Support, a Reply Brief, an Application for Counsel Fees and Expenses, a Brief in Support, a Reply Brief, a Pre-trial Memorandum and Proposed Findings of Fact and Conclusions of Law.

37. Attorney Dusman maintained a detailed record of the time spent and tasks performed in this action.

38. Attorney Dusman maintained time records contemporaneously with the work performed.

39. Attorney Dusman kept itemized records of expenses related to this case.

40. The total attorney's fees incurred defending the case were $2,754.00.

41. The total costs incurred defending the case were $14.03.

42. The total attorney's fees incurred with respect to the application for counsel fees were $2,988.00.

43. The total costs incurred with respect to the fee application were $163.00.

44. Attorney Dusman charged an hourly rate of $60.00.

III. Discussion.

Donna G. Thrush contends that she is entitled to an award of attorney's fees against John D. Thrush and his attorney, Allen H. Smith, pursuant to Fed.R.Civ.P. 11 and 42 U.S.C. §1988. We shall first address the claim brought under Rule 11 of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 11 which governs the signing of pleadings and motions requires that each pleading or motion be signed by an attorney. The Rule provides in relevant part that

> . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other papers is signed in violation of this Rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Although the Rule states that the Court "shall impose" a sanction if a paper is signed in violation of the Rule, the sanction to be imposed rests within the Court's discretion. Eavenson, Auchmuty, and Greenwald vs. Holtzman, 775 F.2d 535 (3d Cir. 1985).

The notes of the Advisory Committee on the Federal Rules make it clear that Rule 11's provisions are designed to discourage dilatory or abusive tactics and to reduce the number of

frivolous claims and defenses brought in federal courts. Fed.R.Civ.P. 11 Advisory Committee Note. The standard for testing conduct under Rule 11 is objective reasonableness under the circumstances. Eavenson, Auchmuty, and Greenwald vs. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985). In considering whether Attorney Smith formed a belief after a reasonable inquiry that the pleadings filed in this case were well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, we must determine what was reasonable for him to believe at the time the pleadings were submitted.

In our view this case falls squarely within the parameters of the type of frivolous claims for which Rule 11 allows the Court to impose sanctions. The allegations are so entirely frivolous and groundless as to evince an improper purpose on the part of John D. Thrush and his attorney in filing the complaint.

The complaint indicates *on its face* that this Court lacks jurisdiction to hear the case. It alleges that John D. Thrush's civil rights were violated by his ex-wife, Donna G. Thrush who filed a divorce action against him and the Honorable Clarence C. Morrison, the judge who granted the divorce and ordered the marital property equitably distributed, because the equitable distribution section of the Pennsylvania Divorce Code is unconstitutional. Paragraph 10 of the complaint states:

> 10. Plaintiff appealed the order and decree [of Judge Morrison] to the Superior Court of Pennsylvania alleging an unconstitutional taking of property under the Constitution of the United States and under the Constitution of Pennsylvania, which appeal was denied by the Superior Court of Pennsylvania in its Decision of July 12, 1985.

Paragraph 11 of the complaint states:

> 11. Plaintiff petitioned the Supreme Court of Pennsylvania for allowance of appeal from the final order of the Superior Court of Pennsylvania and by letter of June 1, 1986, Plaintiff was advised that his petition for allowance of appeal was denied.

The above quoted paragraphs show that this Court was in essence being called upon to review a decision of the highest court of the state of Pennsylvania which we may not do. Only the United States Supreme Court may review such decisions. 28 U.S.C. §1257; Atlantic Coastline Ry. Co. vs. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). This rule of law may not be subverted by the filing of an action in a federal district court cast in the form of a civil rights suit. Hale vs. Harney, 786 F.2d 688 (5th Cir. 1986), *citing* District of Columbia Court of Appeals vs. Feldman, 460 U.S. 462, 482 n. 16 (1983). A minimum of research would have revealed this fundamental principle of law to John D. Thrush and his attorney, Allen H. Smith.

Additionally, John D. Thrush and his attorney, Allen H. Smith, became aware that 28 U.S.C. §1257 precluded this Court from reviewing the Pennsylvania Supreme Court's denial of John D. Thrush's petition by Donna G. Thrush's motion to dismiss. They opposed it nonetheless. Attorney Smith's signature on the brief in opposition therefore constituted a further violation of Rule 11. At the time the brief was filed he knew or clearly should have known that this Court had no jurisdiction and that opposing the motion was without merit and a waste of judicial resources.

The claim for relief against Donna G. Thrush pursuant to 42 U.S.C. §1983 was also patently frivolous. To state a claim under 42 U.S.C. §1983, the conduct complained of must be committed by a person acting under color of state law, Parratt v. Taylor, 451 U.S. 527 (1981), or in concert with someone acting under color of state law. Dennis vs. Sparks, 449 U.S. 24 (1980). Paragraph 6 of the complaint states:

> 6. Defendants are sued individually and in their official capacities. Relief is sought against them as well as their agents, assistants, employees, and persons acting in concert or cooperation with them or at their direction or under their supervision.

Paragraph 7 of the complaint states:

> 7. At all times relevant herein Defendants have acted under the color of authority of the law of the Commonwealth of Pennsylvania or in active concert with such Defendant who was so acting.

No facts were alleged in the complaint showing what Donna Thrush's official capacity was or how she acted in concert with someone acting under color of state law in an official capacity. At the hearing Attorney Smith testified that he did not make any inquiry as to whether Donna G. Thrush acted in an official capacity or in concert with an official. This admission constitutes a clear violation of Rule 11's requirement that the pleading after reasonable inquiry be well grounded in fact. Moreover, Mr. Thrush, who is himself no stranger to the law and who swore in an affidavit attached to the complaint that the facts alleged were true, knew that his ex-wife had not acted under color of state law in an official capacity or in concert with a state official. When asked at the hearing what official capacity he was referring to in ¶6 and ¶7 of the complaint he answered, "I can't really think what official capacity she would have."

Mr. Thrush did testify that he directed Mr. Smith to a forms book containing sample 42 U.S.C. §1983 complaints. It seems that the form rather than fact was relied upon in drafting the complaint in this case. No semblance of a reasonable inquiry as is required by Rule 11 was made as to whether the allegations of the complaint were well grounded in fact or law. This is particularly apparent in light of the fact that in defense of the Rule 11 motion both John D. Thrush and his lawyer conceded that Donna G. Thrush has not acted in an official capacity under color of authority of the Commonwealth of Pennsylvania.

John D. Thrush argues that a Rule 11 sanction is not merited because the complaint was based on a good faith argument for an extension, modification, or reversal of existing law. The gist of his argument is that after exhausting all available state court remedies, litigants may raise identical claims in a federal district court if they have been denied a full and fair opportunity to litigate their claims in the state courts. This theory would not only negate in substantial measure the rule

that only the United States Supreme Court may review a decision of the highest court of a state under 28 U.S.C. §1257 but would also greatly expand the jurisdiction of the lower federal courts. At a time when the federal courts are more burdened than ever before and when serious discussion has focused on *limiting* the jurisdiction of federal courts by abolishing or modifying the requirements for diversity jursidiction, we are not persuaded that this argument to expand jurisdiction has been made in good faith. Furthermore, in his responsive brief to the motion of the Defendants to dismiss, John D. Thrush argued that his action was supported by existing law. Only *after* the filing of the Rule 11 motion, did he advance the argument that he was attempting to extend, modify, or reverse existing law. Failure to present a claim as an attempt to expand existing law prior to the filing of Rule 11 motion supports the imposition of sanctions. *See* Pensiero vs. Lingle, Civil No. 86-0411, March 27, 1987, (M.D. Pa. Caldwell, J.) Moreover, a satisfactory explanation for Thrush's failure to appeal to the United States Supreme Court has not been offered. We conclude that the motion for sanctions should be granted. John D. Thrush and his attorney are equally at fault. We shall order John D. Thrush and his attorney to pay the reasonable expenses incurred by Donna G. Thrush in defending this frivolous action.

Determining that reasonable attorney's fees and costs will be awarded as a sanction for violating Fed.R.Civ.P. 11, obviates the need to address Donna G. Thrush's application for attorney's fees and costs pursuant to 42 U.S.C. §1988. We shall now address the reasonableness of the requested attorney's fees and costs.

Donna G. Thrush's attorney, Dianne E. Dusman, seeks counsel fees for her representation of Donna G. Thrush defending this action and for the application for counsel fees in the amount of $5,919,02. The amount may be broken down as follows:

Counsel fees for defense of case	$2,754.00
Costs incurred during defense of case	14.02
Counsel fees for attorney's fees phase of case	2,988.00
Costs for attorney's fees phase of case	163.00
Total	$5,919.02

At the hearing on Donna G. Thrush's application for attorney's fees and costs, attorney Dusman introduced an itemized statement of services rendered, hours expended, and costs incurred in her representation of Donna G. Thrush in this case. Attorney Dusman testified that the time records were maintained contemporaneously with the work performed and that the charges for attorney's fees were below the normal and customary rate charged by attorneys with her experience. To that extent she challenged the reasonableness of her own fee but did not seek an amount in excess of $60.000 per hour.

John D. Thrush did not contest the reasonableness of the hourly rate, the costs or the time expended. He argued that any award of counsel fees would be improper and contended, without citing any authority, that fees incurred in pursuit of the application for counsel fees were beyond the scope of Fed.R.Civ.P. 11. We cannot agree. Successful movants under Fed.R.Civ.P. 11 are entitled to fees for time spent in preparing the motion, a supporting brief, time itemization, an arguing the motion at a hearing. *See* Prandini vs. National Tea Co., 585 F.2d 47, 53 (3d Cir. 1978).

We have reviewed the file, the testimony at the hearing, and the itemized statement of services rendered, hours expended, and costs incurred and conclude that a fee of $5,919.02 is reasonable and should be awarded.

IV. Conclusions of Law.

1. The signature of attorney Smith on the complaint certified that to the best of his knowledge, information and belief, formed after reasonable inquiry, the complaint was well-grounded in fact and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law.

2. The signature of attorney Smith on the complaint certified that the complaint was not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. Attorney Smith did not make a reasonable inquiry into the facts prior to signing and filing the complaint.

4. Attorney Smith did not make a reasonable inquiry into the law prior to filing the complaint.

5. Attorney Smith did not advance a good faith argument for extending, modifying, or reversing existing law at the time of filing the complaint.

6. Attorney Smith's argument that John D. Thrush did not have a fair and full opportunity to litigate the constitutionality of the equitable distribution section of the Pennsylvania Divorce Code in the Pennsylvania courts and that this Court therefore had jursidiction to act was frivolous.

7. It was unreasonable to file this federal district court action against Donna G. Thrush.

8. It was unreasonable under all of the circumstances to oppose Donna G. Thrush's motion to dismiss, particularly after becoming aware that this Court lacked subject matter jurisdiction.

9. Attorney Dusman's hourly rate of $60.00 per hour is reasonable.

10. The total fees and costs incurred in this case are reasonable.

11. John D. Thrush and his attorney Allen H. Smith are jointly and severally liable to Donna G. Thrush in the amount of $5,919.02 pursuant to Fed.R.Civ.P. 11.

An appropriate order will be entered.

MUIR, U.S. District Judge

DATED: July 27, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5608

JOHN D. THRUSH

v.

CLARENCE C. MORRISON and DONNA G. THRUSH

John D. Thrush and
Allen H. Smith,
Appellants

Submitted Under Third Circuit Rule 12(6)
February 29, 1988

BEFORE: SEITZ, HIGGINBOTHAM and COWEN, *Circuit Judges*.

JUDGMENT ORDER

Upon consideration of this matter along with the district court's opinion, and being aware of the restraint that is to be employed in applying Rule 11 sanctions, see *Gaiardo v. Ethyl Corporation*, No. 87-5248 (filed December 14, 1987), it is nevertheless

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

_____
Circuit Judge

ATTEST:

_____
Sally Mryos, Clerk

DATED: March 1, 1988

28 U.S.C. §2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

42 U.S.C. §1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the districts courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against

law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule of Civil Procedure 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of

the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

Pennsylvania Rule of Civil Procedure 235. Notice to Attorney General. Constitutionality of Statute

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.